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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1160

L. B. FOSTER COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

L. B. Foster Company, Petitioner herein, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, entered in this case on October 31, 1969, granting enforcement of an Order issued against Petitioner by the National Labor Relations Board.

OPINION BELOW

The Opinion of the Court of Appeals (Appendix "App." A, *infra*, p. 1a) is reported at ..... F.2d...., 72 LRRM 2736. Petition for Rehearing was denied on December 2, 1969 (App. C, p. 14a). The Findings of Fact, Conclusions of Law and Order of the National Labor Relations Board are reported at 168 NLRB No. 15 (App. D, p. 15a).

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1969 (App. B, p. 9a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(e) ("Act").

QUESTIONS PRESENTED

(1) Whether this Court's decision in the case of *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969) grants authority to the National Labor Relations Board to issue bargaining order remedies based solely on § 8(a)(1) violations under the same standards and guidelines as established in *Gissel* for the Board to issue bargaining orders to remedy § 8(a)(5) violations.

(2) Whether an employer may be held responsible for the unfair labor practices of an employee without a proper finding that the employee was a supervisor within the meaning of Section 2(11) of the Act or an agent of the employer within the meaning of Sections 2(2) and 2(13) of the Act.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151 et seq.), are as follows:

Section 9(c):

> "(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board
>
> "(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i)

wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently reorganized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

Section 10(e):

"* * *The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."

Section 2(2):

> "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

Section 2(11):

> "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Section 2(13):

> "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

STATEMENT OF THE CASE

In one day, October 31st, 1966, a former employee of Petitioner obtained signed Union[1] authorization cards from 14 of the 18 employees in the unit (App. D, p. 20a, 28a). However, the Union did not inform Petitioner of its alleged majority status or demand bargaining rights. By the date

[1] International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, Local Union No. 692.

of the representation election, December 20th, 1966, only 9 employees were eligible to vote, since 9 employees had been lawfully terminated by Petitioner (App. D, p. 19a, 21a, 28a). All 9 of the terminated employees had signed Union authorization cards (App. D, p. 28a).

Thus, at the time of the election only 5 of the 9 eligible voters had signed authorization cards. When the ballots were counted, only 5 of the 9 eligible voters had bothered to vote, two ballots were cast for Union representation and three ballots were cast against (App. D, p. 19a, 21a).

Having lost the election, the Union proceeded to file unfair labor practice charges against Petitioner, alleging violations of Sections 8(a)(1) and 8(a)(5) of the Act (App. D, p. 25a-27a). The Board found that, "the evidence fails to establish that Respondent unlawfully refused to bargain with the Union in violation of Section 8(a)(5) of the Act" (App. D, p. 33a). The Board did, however, find merit to the charge that Petitioner violated Section 8(a)(1) of the Act (App. D, p. 25a-27a).

The Board found that an employee of Petitioner's, Martin Synakowski, was a supervisor within the meaning of the Act and that he committed all the 8(a)(1) violations, except two (App. D, p. 25a-26a). Those two involved conversations between Plant Superintendent George Chernove, an admitted supervisor, and a single employee, the other, a single incident when an Assistant Plant Superintendent, also an admitted supervisor, talked to three employees (App. D, p. 22a, 26a).

On the basis of the alleged violations of Section 8(a)(1) of the Act, the Board ordered Petitioner to recognize and bargain with the Union, "in order to prevent (Petitioner) from reaping the benefits of its own misconduct." (App. D, p. 28a).

The Court of Appeals enforced the Board's order. The Court held that Petitioner was responsible for the unlawful conduct of Synakowski because Petitioner "acted through" Synakowski (App. A, p. 2a). The Court then held, after dis-

cussing the *Sinclair* portion of this Court's decision in *Gissel*, that, "It follows that the *Gissel* decision requires that we enforce the order." (App. A, p. 5a).

REASONS FOR GRANTING THE WRIT

It is essential that this Court grant review here. Recurring litigation has arisen under the Act with respect to the standards and guidelines which the National Labor Relations Board should implement in issuing bargaining orders based solely on violations of Section 8(a)(1) of the Act and this Court's decision in *Gissel* has created further confusion in this area. Much litigation has reached the Court of Appeals in recent years with respect to an employer's responsibility for the unlawful acts of its employees. The present case promises an ideal vehicle for this Court to elucidate these important areas in the administration of the Act and to provide necessary guidelines.

I. The Decision Below Misconstrued The *Gissel* Decision And Applied It Far More Broadly That Its Proper Limits.

In the *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969) case, this Court established certain guidelines relating to the proper construction of Sections 8(a)(5) and (1) of the Act and the issuance of bargaining orders thereunder.

The Court below has now misconstrued the *Gissel* decision and applied it far more broadly than its proper limits. By so doing, the Court below has established that the National Labor Relations Board has the authority to issue bargaining order remedies based on Section 8(a)(1) violations on the same basis it issues bargaining orders based on Section 8(a)(5) violations.

In *Gissel*, this Court considered three categories or situations involving the Board's remedial powers. First, "im-

posing a bargaining order, without need of inquiry into majority status on the basis of cards or otherwise, in 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices." Id. at 613. Second, "The only effect of our holding here is to approve the Boards use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." Id. at 614. Third, "minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order." Id. at 615.

The first category applies to the instant case, since it does not involve either a bargaining demand nor a violation of Section 8(a)(5), but instead a bargaining order that is based solely on Section 8(a)(1) violations. Yet, the Court below held that this Court's disposition of the *Sinclair* case in *Gissel* required enforcement of the Board's bargaining order in the instant case.

It is clear from the *Gissel* decision, that *Sinclair,* and the three other cases in *Gissel* fell under the second category that requires a finding of a violation of Section 8(a)(5). All four cases in *Gissel* involved a Union demand for recognition based on Union authorization cards and a finding that the employers violated Section 8(a)(5) by refusing to bargain. The difference in *Sinclair* was that this Court held that a Board finding "that the employer's threats of reprisal were so coercive that, even in the absence of a § 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those threats," sufficiently met the guidelines established by the Court in the second category that the Board therefore did not have to make the determination, "that the risks that a fair rerun

election might not be possible were too great to disregard the desires of the employees already expressed through the cards." Id. at 615.

The other three cases in *Gissel* were all remanded to the Board since they did not contain similar findings that a bargaining order would have been necessary in the absence of an unlawful refusal to bargain and that even though traditional remedies might be able to ensure a fair election there was insufficient indication that an election would definitely be a more reliable test of the employee's desires than the card count taken before the unfair labor practice occurred.

As this Court stated, its decision in *Gissel* concerned, "the propriety of a bargaining order as a remedy for a § 8(a)(5) refusal to bargain where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside." Id. at 610. Petitioner has committed no § 8(a)(5) violation and should be judged according to the standards already established in the cases of *United Steelworkers of America* v. *NLRB*, 376 F.2d 770 (C.A.D.C., 1967) and *J. C. Penny Co., Inc.* v. *NLRB*, 384 F.2d 479 (C.A. 10, 1967),[2] involving bargaining orders based on § 8(a)(1) violations.

The test as to the propriety of a bargaining order remedy based solely on § 8(a)(1) violations is and should remain different from those applied to a bargaining order based on both § 8(a)(5) and (1) violations. In the latter case, the employer receives a demand for recognition from a union claiming majority status and if the employer thereafter commits unfair labor practices it logically follows that the

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[2] Cited by this Court in *Gissel*, Id. at 613.

employer's purpose was to undermine Union support and dissipate the union majority before the election. However, in a § 8(a)(1) bargaining order situation, there is no demand for recognition by the union, nor any claim of majority status, instead the employer conducts a vigorous campaign that gives rise to § 8(a)(1) violations. This is not to say that such violations should be condoned, but only that in this context more should be required of the Board in issuing bargaining order remedies than the one line statement in *Sinclair* that the employer's violations were "so coercive that . . . a bargaining order would have been necessary to repair the unlawful effect of those [violations]." *NLRB* v. *Gissel Packing Co.*, supra at 615.

As this Court recognized in *Gissel*, "The Board itself . . . has long had a similar policy of issuing a bargaining order, in the absence of a § 8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices." Id. at 614. Petitioner only asks that it be judged by this standard and not the improper one applied by the court below.

If judged by the correct standard, Petitioner can establish that this case does not warrant a bargaining order remedy.

II. The Decision Below Is In Conflict With The Decisions Of The Second Circuit With Regard To The Authority Of The Board To Issue Bargaining Orders To Remedy Violations Of Section 8(a)(1) Of The Act.

In *NLRB* v. *Patent Trader, Inc.*, 415 F.2d 190 (C.A.2, 1969), the Court of Appeals for the Second Circuit distinguished the *Gissel* case and relied on the authority of its previous decisions concerning bargaining orders to remedy Sections 8(a)(1) and (3) violations to deny enforcement of

a Board bargaining order to remedy a violation of Section 8(a)(5).

The previous decisions were, *NLRB* v. *Flomatic Corp.*, 347 F.2d 74 (C.A.2, 1965) and *NLRB* v. *Better Val-U Stores*, 401 F.2d 491 (C.A.2, 1968). In *Flomatic*, the Second Circuit denied enforcement of the Board's bargaining order remedy based solely on 8(a)(1) violations. Similarly, in *Better Val-U Stores*, the Second Circuit refused to enforce the Board's bargaining order remedy based on Sections 8(a)(1) and (3) violations.

Judge Feinberg, who dissented in the *Patent Trader* case from the Court's refusal to enforce the Board's bargaining remedy for a violation of 8(a)(5), recognized the distinction that should be made between bargaining order remedies for 8(a)(1) and (3) violations and those to remedy 8(a)(5) violations. For in both *Flomatic* and *Better Val-U Stores*, there were no findings by the Board of a refusal to bargain; rather the Board sought enforcement of its bargaining orders to remedy § 8(a)(1) and (3) violations. In refusing enforcement, the Second Circuit had called such bargaining orders "strong medicine," emphasizing employee freedom of choice and the preference in the Act for an election to determine that choice. Judge Feinberg stated, "But, however strong may be the medicine of a bargaining order in 8(a)(1) and (3) cases, both *Flomatic* and *Better Val-U Stores* make clear that it is the normal prescription for remedying a violation of 8(a)(5)." *NLRB* v. *Patent Trader, Inc., supra* at 204.

There can be no doubt but that Judge Feinberg and the majority opinion in the *Patent Trader* case reaffirmed the Second Circuit's opinions in both *Flomatic* and *Better Val-U Stores* in light of *Gissel* and will apply the standards established in those cases to all future Board bargain-

ing order cases based on Sections 8(a)(1) and (3) violations.

The conflict is apparent between the *Patent Trader* case and the present case. Here the Ninth Circuit relies solely on *Gissel* and the *Sinclair* case in enforcing the Board's bargaining order which is based only on violations of Section 8(a)(1).

This conflict between the Second Circuit and the Ninth Circuit on this issue should be resolved by this Court.

III. The Decision Herein Is In Conflict With Decisions Of This Court, Other Circuits, And The Board With Respect To An Employer's Responsibility For The Acts Of Its Employees.

The Board made specific findings that employee Synakowski was a supervisor within the meaning of the Act. As the Court below noted, this finding was strenuously challenged by Petitioner (App. A, p. 2a). Counsel for both Petitioner and the Board argued orally and by brief over whether Synakowski was or was not a supervisor within the meaning of § 2(11) of the Act.

The Court below did not decide the issue of whether or not Synakowski was a supervisor, but instead attributed his acts to Petitioner, because Petitioner "acted through" Synakowski (App. A, p. 2a). Thus, it is clear that the Court below did not sustain the Board's finding that Synakowski was a supervisor within the meaning of § 2(11) of the Act. But it is not clear upon what legal basis Petitioner is being held to account for the alleged unlawful acts of Synakowski.

Under the Act, an employer is responsible for the acts of its "supervisors," defined in § 2(11) of the Act, and "any person acting as an agent of an employer, directly or

indirectly," § 2(2) of the Act. Petitioner knows of no others for whom the employer must answer for their unlawful activity under the Act. *Henry I. Siegel Co., Inc.* v. *NLRB*, ... F.2d ....., 72 LRRM 2720 (C.A. 6, decided November 4, 1969); *NLRB* v. *Lake Butler Apparel Co.*, 392 F.2d 76 (C.A.5, 1968); *Montgomery Ward & Co., Inc.* 153 NLRB 482 (1965). Since the Court below specifically declined to decide the supervisory status of Synakowski, it must then have decided that Synakowski was an agent of Petitioner. Support is found for this position in the Court's reference that Synakowski's "agency is supported by substantial evidence." (App. A, p. 2a).

However, neither counsel argued or briefed whether Synakowski was an agent of Petitioner. To do so would have been improper since that issue had not been raised or decided by the Board in this case. *NLRB* v. *Threads, Inc.*, 308 F.2d 1 (C.A.4, 1962).

Therefore, Petitioner has now, for the first time, been held responsible for Synakowski's unlawful activity on the basis of an agency theory. Just what agency theory the Court below utilized is unclear. The Court equated agency with the fact that, "The Board found that the employer *acted through* Synakowski." (App. A, p. 2a). And also stated that, "The Board concluded from the foregoing that the employer, acting through Chernove, Streetman, and Synakowski, violated Section 8(a)(1) of the act . . ." (App. A, p. 2a).

Petitioner submits that the Board made neither of the above findings. The Board's decision and order contain specific findings that Petitioner was responsible for the coercive statements of Chernove, Streetman and Synakowski because they were supervisors within the meaning of the Act. As the Board decision notes, the Petitioner admitted that both Chernove and Streetman were supervisors.

(App. D, p. 22a) Thus, there was no need, nor is there any finding, in the Board's decision that Petitioner was responsible for the statements of Chernove and Streetman because Petitioner "acted through" them. For the same reasons, there is no finding in the Board's decision that Petitioner "acted through" Synakowski.

Even if the Board had made such a finding it could not be properly upheld under the Taft-Hartley Act. Perhaps it could under the old Wagner Act for "Employer" was then defined to include "any person acting in the interest of the employer, directly or indirectly." However, with the passage of Taft-Hartley in 1947, the above definition was changed to, "any person acting as agent of an employer, directly or indirectly." Section 2(2) of the Act. The cases decided after 1947 and the legislative history of this change make it clear that its effect was to tighten the test to determine who was an agent of an employer. *NLRB* v. *General Metal Products Co.*, 410 F.2d 473, 475-476 (C.A. 6, 1969); *Lummus Company* v. *NLRB*, 339 F.2d 728, 735 (C.A.D.C., 1964). (See, fn. 20 citations on legislative history); *NLRB* v. *Arkansas-Louisiana Gas Co.*, 333 F.2d 790, 794-796 (C.A. 8, 1964).

Thus, the common law of agency is now applicable to employers and labor organizations alike in attributing the conduct of others to them. And though the principles of agency and its establishment are to be construed liberally, *NLRB* v. *Arkansas-Louisiana Gas Co., supra,* agency cannot be established under Section 2(2) of the Act by the mere assertion that Petitioner "acted through" Synakowski. Instead, as this Court stated in *International Association of Machinists, etc.* v. *NLRB,* 311 U.S. 72, 80, 61 S. Ct. 83, 88, 85 L. Ed. 50 (1940):

> "The employer, however, may be held to have assisted the formation of a union even though the acts of the

> so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of *respondent superior*. We are dealing here not with private rights (Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261 [60 S.Ct. 561, 84 L. Ed. 738]) nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants, but with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence. The existence of that interference must be determined by careful scrutiny of all the factors, often subtle, which restrain the employees' choice and for which the employer may fairly be said to be responsible."

Since the Board, in the present case, held that Synakowski was a supervisor, the Board did not even discuss, much less determine, "by careful scrutiny of all the factors, often subtle," Petitioner's legal responsibility to its employees for the acts of its alleged agent, Synakowski. Nor did the Board, or the Court below, apply any principles of agency in finding Petitioner responsible for the unlawful acts of Synakowski.

Thus, it is evident that the Court below could not properly find that Petitioner was responsible for the coercive statements of Synakowski on the basis that he was an agent of Petitioner within the meaning of § 2(2) of the Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. L. B. FOSTER COMPANY, *Respondent.*	No. 23,121

[October 31, 1969]

On Petition to Enforce an Order of the National Labor Relations Board

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Before: BARNES, DUNIWAY and ELY, Circuit Judges

DUNIWAY, Circuit Judge:

The National Labor Relations Board petitions for enforcement of its order directing that the respondent employer cease and desist from interfering with its employees' rights under section 7 of the National Labor Relations Act, 29 U.S.C. § 157, setting aside a representation election held in December, 1966, which the Teamsters Union lost, and directing the employer to bargain with that union. For reasons that follow, we conclude that the order should be enforced in full.

The Teamsters attempted, beginning in October of 1966, to organize the employees at the employer's pipe yard in Long Beach, California. On October 31, the union secured authorization cards signed by 14 of the 18 employees working at the pipe yard. The Board's cease and desist order was based essentially upon evidence as to the activities of three individuals during the seven weeks from October 31 until the representation election. These were the plant superintendent, Chernove, the assistant plant superintendent, Streetman, and an employee of disputed

supervisory status, Synakowski. There is evidence that they actively opposed the union's organizational campaign and that their manner of opposition far exceeded the permissible.

Synakowski, the plant foreman whose capacity as a "supervisor" under section 2(11) of the Act, 29 U.S.C. § 152(11), is strenuously challenged by the respondent,[1] actively fought the union's organizational drive. The Board found that he coercively interrogated employees regarding their union plans, that he attempted to solicit co-workers to reject the union in order to keep their jobs, that he told employees they were being laid off because of their support of the union, and that he threatened to employees that Chernove would close the plant down if it became unionized.

The Board concluded from the foregoing that the employer, acting through Chernove, Streetman, and Synakowski, violated section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by interfering, restraining, and coercing employees in the exercise of their section 7 right to decide whether or not to organize collectively. This determination is conclusive on review by this court, since the factual findings are supported by substantial evidence on the record considered as a whole, *Universal Camera Corp. v. NLRB*, 1951, 340 U.S. 474, 95 L.Ed. 456, 71 Sup.Ct. 456; National Labor Relations Act § 10(e), 29 U.S.C. § 160(e); Administrative Procedure Act § 10(e), *as amended*, 5 U.S.C. § 706 (2)(E). Accordingly, that part of the Board's order setting aside the 1966 election and directing the employer to cease and desist from continuing to violate section 8(a)(1) will be enforced.

In determining whether we should enforce that part of the Board's order that the employer must, upon request, bargain with the Teamsters Union, we have found it necessary carefully to examine the Supreme Court's recent, extensive discussion of principles applicable to the appropriateness of bargaining orders

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[1] Resolution of the supervisory status of Synakowski is not necessary for the purpose of determining whether the respondent violated section 8(a)(1). The Board found that the employer *acted through* Synakowski. Since his agency is supported by substantial evidence, his acts are attributed to the employer. National Labor Relations Act § 2(2), 29 U.S.C. § 152(2).

following the signing of unambiguously worded authorization cards by a majority of employees in a bargaining unit. *NLRB v. Gissel Packing Co.*, 1969, 395 U.S. 575. A secret election as contemplated by section 9 of the Act is the preferred method for the determination of whether employees shall be organized collectively, and reliance on authorization cards is "admittedly inferior to the election process." *Id.* at 603. Nevertheless, bargaining orders may be proper in situations wherein an employer's unfair labor practices have gone beyond minor violations with minimal impact on the election machinery and have vitiated the will of a majority of employees as expressed through the signing of the cards. In such situations, "cards may be the most effective—perhaps the only—way of assuring employee choice." *Id.* at 602. In this respect, we read, at 614-15, the following:

> "In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue. . . ."

The Court remanded two of the three cases consolidated for hearing in *Gissel Packing Co.* for further findings by the Board as to whether a bargaining order was necessary or was the preferable remedy in light of the uncertain prospects for protection of the employee's rights by traditional remedies. In the third case, *Sinclair Co. v. NLRB* (see 1 Cir., 1968, 397 F.2d 157), the Supreme Court affirmed the First Circuit, which had enforced the Board's order to bargain. In doing so, the Supreme Court said: (p. 615)

> "the Board made a finding, left undisturbed by the First Circuit, that the employer's threats of reprisal were so coercive that, even in the absence of an § 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those threats."

The actual finding of the Board in *Sinclair* reads as follows:

> "It is recommended that, upon request, the employer recognize and bargain collectively with the union. The same bargaining order would have been recommended even if the record had warranted a conclusion that the employer relied on a bona fide doubt of the union's majority in refusing to bargain with the union. The union represented a clear majority of journeymen wire weavers when the employer began its unlawful campaign directed at destroying the majority. To the extent that the election revealed a loss of union support thereafter, such loss must be found attributable to the employer's unfair labor practices." 1957 CCH NLRB ¶ 21.296, at 27,732.

In the instant case the Board adopted the findings, conclusions, and recommendations of the trial examiner, who wrote, as to the necessity of a bargaining order, as follows:

> ". . . I . . . recommend, because of the nature and extent of the violations of Section 8(a)(1) of the Act, as herein found, and as a part of the remedy for such violations, that Respondent be required, upon request, to recognize and bargain with the Union in order to prevent it from reaping the benefits of its own misconduct. There can be no question that the Union was the majority representative when it filed the representation petition, having on October 31, obtained valid authorization cards from 14 of the 18 employees in the unit. . . . Even if there be excluded from consideration the nine employees (each of whom had signed a card), that the Regional Director found were lawfully terminated in November, the Union still represented five of the remaining nine . . . on the day of the election. Under the facts of this case, the only logical conclusion is that the Union's failure to obtain a majority in the election was due to the fact that extensive and flagrant 8 (a)(1) conduct herein found, and which clearly had for its purpose the undermining of the Union and the destruction of its majority status, had the intended effect. The law so assumes. In such a situation, only a bargaining order will restore the *status quo ante*, and prevent Respondent from reaping the benefits of its unlawful conduct." (Citations omitted.)

We think this finding as complete and persuasive as the finding in the *Sinclair* case. It follows that the *Gissel* decision requires that we enforce the order. See 395 U.S. at 612 n. 32.

The employer, however, argues that circumstances have changed so drastically that the order to bargain should not be enforced. As indicated in the above quoted excerpt from the opinion of the trial examiner, the Board's Regional Director found that nine of the eighteen employees who had been employed on October 31 had been lawfully terminated prior to the representation election on December 20, 1966. Only five of the remaining nine voted in that election which the union lost by a 3-2 vote, although the union had held authorization cards from a majority of the nine remaining employees. Nearly three years have passed since the union was defeated by the 3-2 vote, and even earlier was the card signing upon which the union claimed its majority status. There is rapid turnover of the respondent's personnel. The Board's Regional Director, from his examination of the respondent's records, found that in the year 1966 alone, "there were 45 employees laid off or terminated, of which only 2 were subsequently rehired." It is not known whether a majority of the employees presently employed desire representation by the Teamsters Union or any other union. It is possible that, as of now, there is not a single remaining employee who was concerned with the original election. Thus reliance is placed primarily upon facts occurring after the invalid election, and after the Board's decision.

We do not think that these facts permit us to refuse to enforce the Board's order. The delay is not the fault of the union; if it is anyone's fault, it is that of the employer. But regardless of fault, it is an unfortunate but inevitable result of the process of hearing, decision and review prescribed in the Act. And to deny enforcement, with or without remand for reconsideration on the basis of facts occurring after the Board's decision, is to put a premium upon continued litigation by the employer; it can hope that the resulting delay will produce a new set of facts, as to which the Board must then readjudicate. Suppose that the Board does so, and again finds against the employer. There can then be a petition to this court, a decision by it, and a petition for certiorari to the Supreme Court. By that time

there will almost surely be another new set of facts. When is the process to stop?

This case and *Sinclair* both illustrate the possibilities. In *Sinclair,* the election was held December 9, 1965, the Board's order was entered May 12, 1967; the First Circuit ordered it enforced on July 3, 1968; the Supreme Court affirmed on June 16, 1969. In *Sinclair,* there were 14 in the unit; 11 had signed cards; the union lost the election, 6 to 7; there was apparently no evidence as to what had happened thereafter, in 1968 or 1969. There is no hint in the Supreme Court's *Gissel* opinion, either to *Sinclair* or as to the other cases there decided, that there should be a reconsideration in light of subsequent occurrences.

In our case, the election was in December, 1966; the Board's order was entered in November, 1967; it is now late in 1969. The time period from election to Board order is substantially less than in *Sinclair,* but subsequent delays (including our own in waiting for the Supreme Court to decide *Gissel*) are similar.

Emphasis is given to the rapid turnover in the employer's personnel as a reason for not enforcing the order. But we think that this is a reason to enforce. Otherwise there will be an added inducement to the employer to indulge in unfair practices in order to defeat the union in an election. He will have as an ally, in addition to the attrition of union support inevitably springing from delay in accomplishing results, the fact that turnover itself will help him, so that the longer he can hold out the better his chances of victory will be. That is vividly illustrated here, where the union began with 14 of 18 employees and was down to 5 signers out of 9 in the unit when the election was held.

To appraise the problem in the light of subsequent events is wholly unrealistic. If the employer had not unlawfully interferred with the election, one of two things would have happened. The union might have lost, and that would have ended the matter. The employer was entitled to no more than that possibility. On the other hand, as the trial examiner concluded, the union could have won. The employer would then have had to recognize and bargain with it. The ability of a union so situated to maintain its position, even in an enterprise where turnover is rapid, is vastly different from its ability to do so where it has lost an

election, is not recognized, and can do nothing whatever for the employees. To a union, recognition and bargaining are the be-all and end-all of its existence. See the discussion in *Gissel, supra,* 395 U.S. at 610-613.

Our decision is supported by the following decisions of this court, in each of which, after long delays in litigation, we enforced a Board order to bargain in spite of substantial changes in the situation occurring after the election: *NLRB v. C & C Plywood Corp.*, 9 Cir., 1969, ... F.2d ..... (No. 22,305, decided June 6, 1969); *NLRB v. Luisi Truck Lines,* 9 Cir., 1967, 384 F.2d 842, 847-48. (Seven of ten in the unit signed cards, but the union lost the election. Board bargaining order was enforced three years later, although only one of the original seven was still employed.) *Sakrete of No. Calif. Inc. v. NLRB,* 9 Cir., 1964, 332 F.2d 902. (Four employees in the unit; all signed cards; all were fired. When offered reinstatement, all refused. Board bargaining order enforced, although none of the original four was employed.) *NLRB v. Geigy Co., Inc.,* 9 Cir., 1954, 211 F.2d 553. (Thirteen of fifteen in the unit signed cards; union lost the election, 6 to 9. Board order to bargain was enforced three years later, although "only a small minority" of the original 13 were still employed.) *NLRB v. Andrew Jergens Co.,* 9 Cir., 1949, 175 F.2d 130, 134-35. (The union was certified in 1946; employer refused to bargain; Board order to bargain enforced in 1948, although none of the then employees was a union member.) There are no contrary cases in this circuit.

The Board's order will be enforced in full.

ELY, Circuit Judge (Concurring):

I concur in my Brother Duniway's opinion. At the same time, I am compelled to say that, were it not for the compulsion of *Gissel Packing Co.* I could not, in the circumstances of this particular case, join in upholding that portion of the Board's order which requires the respondent presently to bargain with the Teamsters Union. As Judge Duniway points out, the employer is blameless for the rapid turnover in its personnel, and "it is possible that, as of now, there is not a single remaining employee who was concerned with the original election." In the light of

these considerations, I would hope that, even though we are obliged to issue an Order of full enforcement, the Board will yet consider itself empowered to determine that the now more desirable course is the conducting of a fair election under the protection of the cease and desist order. Just as it is properly interested in preventing coercive activities which may obstruct the legitimate aims of employees, the Board surely will not desire to thrust upon employees a representative whose status as their bargaining agent is open to serious question.

Professor Bok wrote, approximately five years ago, "But the bargaining order is undoubtedly strong medicine and should, for this reason, be employed with considerable restraint." Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 137 (1964). Not long before the issuance of the opinion in *Gissel*, the Second Circuit had held that a bargaining order should not be enforced unless an employer has exhibited "flagrantly hostile" conduct. *NLRB v. Better Val-U Stores, Inc.*, 401 F.2d 491, 494 (2d Cir. 1968). "The developments in this case demonstrate the vice of imposing a bargaining order long after the occurrence of unfair labor practices that are not refusals to bargain." *Id.* at 495. *See also NLRB v. Flomatic Corp.*, 347 F.2d 74 (2d Cir. 1965). And the Second Circuit has, very recently and despite *Gissel*, again refused to enforce such an order. *NLRB v. Patent Trader, Inc.*, ... F.2d ..... (2d Cir. July 29, 1969), 38 U.S.L.W. 2109.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 11-6-69—325

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* v. L. B. FOSTER COMPANY, *Respondent.*	No. 23121

JUDGMENT

Before: Barnes, Duniway and Ely, Circuit Judges.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent L. B. Foster Company, its officers, agents, successors, and assigns, on November 2, 1967. The Court heard argument of respective counsel on March 4, 1969, and has considered the brief and transcript of record filed in this cause. On October 31, 1969, the Court fully advised in the premises, handed down its decision granting enforcement of the Board's order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Ninth Circuit that Respondent L. B. Foster Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating its employees regarding their or other employees' activities or sympathies for or against any labor organization.

(b) Promising benefits to any employee for ceasing to support or assist any labor organization.

(c) Requesting any employee to urge other employees not to assist or support any labor organization.

(d) Telling any employee that his termination is because of assistance or support of a labor organization.

(e) Telling any employee that a union in its plant would result in a reduction of work for all employees.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized by Section 8(a)(3) of said National Labor Relations Act. (Hereinafter referred to as the Act.)

2. Take the following affirmative action found necessary and designed to effectuate the policies of the aforesaid Act:

(a) Upon request, bargain collectively with General Truck Drivers, Chauffeurs & Helpers Local 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in a unit composed of "All production and maintenance employees, including machine operators, truckdrivers, forklift operators, welders, painters, laborers, warehousemen, and yard helpers at its Long Beach, California, plant, excluding office clerical employees, foreman, professional employees, guards, and supervisors as

defined in the Act," with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a written signed agreement.

(d) Post at its plant in Long Beach, California, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 21 (Los Angeles, California), after being signed by a duly authorized representative, shall be posted by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that such notices are not altered, defaced, or covered by any other material.

(e) Notify the said Regional Director, in writing, within 10 days from the date of this Judgment, what steps the Respondent has taken to comply herewith.

ENDORSED, Judgment Filed and Entered

/s/ WILLIAM B. LUCK
William B. Luck
Clerk

[A TRUE COPY

ATTEST:
William B. Luck
Clerk]

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board, and in order to effectuate the policies of the National

Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT coercively interrogate our employees regarding their or other employees' activities or sympathies for or against any union.

WE WILL NOT promise benefits to any employee to induce him to withdraw his support or assistance to any union.

WE WILL NOT ask any employee to urge other employees to cease supporting any union.

WE WILL NOT tell any employee that his termination is because our employees are assisting or supporting a union.

WE WILL NOT tell any employee that a union in our plant will result in a reduction of work for all employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form, join, or assist General Truck Drivers, Chauffeurs & Helpers, Local 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8(a)(3) of the Act.

WE WILL, on request, recognize and bargain with General Truck Drivers & Helpers, Local 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive representative of our employees in a unit composed of all production and maintenance employees, including machine operators, truckdrivers, forklift operators, welders, painters, laborers, warehousemen, and yard helpers at our Long Beach, California, plant, excluding all office clerical employees, foremen, professional employees, guards, and supervisors as defined in the aforesaid Act, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a written signed agreement.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of the abovenamed or any other Union.

L. B. FOSTER COMPANY
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 849 South Broadway, Los Angeles, California, 90014, Telephone 688--5229.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, December 2nd, 1969
Before: BARNES, DUNIWAY and ELY, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant filed November 13, 1969 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied, and rejecting suggestion for rehearing en banc.

APPENDIX D

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

L. B. FOSTER COMPANY and GENERAL TRUCK DRIVERS, CHAUFFEURS & HELPERS, LOCAL 692, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA	Case No. 21-CA-7457
L. B. FOSTER COMPANY *Employer,* and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION No. 692 *Petitioner.*	Case No. 21-RC-10261

DECISION AND ORDER

On August 14, 1967, Trial Examiner Joseph I. Nachman issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He found further that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint

and recommended dismissal of these allegations. The Trial Examiner also found merit in certain objections to the election conducted on December 20, 1966, and recommended that the election be set aside, that the petition in Case No. 21-RC-10261 be dismissed, and that all proceedings in connection therewith be vacated. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provision of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, Respondent's exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, L. B. Foster Company, Long Beach, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

IT IS FURTHER ORDERED that the petition for certification of representative filed in Case No. 21-RC-10261 be,

and it hereby is, dismissed, and that all prior proceedings held thereunder be, and they hereby are vacated.

Dated, Washington, D. C.

Frank W. McCullough, Chairman
John H. Fanning, Member
Sam Zagoria, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

TXD--447--67
Long Beach, Calif.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

L. B. FOSTER COMPANY

and

Case 21--CA--7457

GENERAL TRUCK DRIVERS, CHAUFFEURS & HELPERS, LOCAL 692, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA

L. B. FOSTER COMPANY

and

Case 21--RC--10261

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION No. 692

Robert M. Cohen, Esq., Los Angeles, Calif., for the General Counsel.
Bulter, Binion, Rice, Cook & Knapp, by James E. Crowther, Esq., Houston, Texas, and Mr. George Chernove, Dominguez, Calif., for Respondent.

TRIAL EXAMINER'S DECISION AND REPORT ON CHALLENGES AND OBJECTIONS

Statement of the Case

Joseph I. Nachman, Trial Examiner: This proceeding heard at Los Angeles, California, on April 25 and 26, 1967, is based on a complaint 1/ pursuant to Section 10(b) of the National Labor Relations Act, as amended (herein called the Act), alleging that in the course of an organizational campaign by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 692 (herein called the Union or Local 692), L. B. Foster Company (herein called Respondent or Company), interfered with, coerced, and restrained its employees in the exercise of their

1/ Issued February 24, 1967, on a charge filed and served January 17, 1967.

organizational rights, and refused on demand to recognize and bargain with the Union as the duly designated collective-bargaining representative of Respondent's employees in an appropriate unit. Respondent by formal answer or by stipulation admitted certain allegations of the complaint, but denied the commission of any unfair labor practice.

By order of the Regional Director issued March 6, 1967, in Case 21--RC--10261, there was consolidated for hearing with the unfair labor practice case, the issues presented by the Union's objections to conduct affecting the results of an election held December 20, which are virtually the same as the allegations of interference, restraint, and coercion in the complaint, and the validity of a challenged ballot cast in the election by Martin Synakowski, which issue turns on whether Synakowski is a supervisor within the meaning of the Act, an issue also tendered in the complaint proceeding.2/

2/ The chronology of events in the representation case, with all dates in 1966, follows:

November 3	Petition filed
December 5	Stipulation for certification upon consent election
December 20	Election held
December 21	Copy of tally of ballots mailed to Union, received by latter December 22, showing that of approximately 20 eligible voters, 2 ballots were cast for the Union, 3 ballots against the Union, and 10 ballots were challenged (1 by the Union and 9 by the Board agent).
December 29	Union filed and served objections to conduct affecting results of election.
March 6, 1967	Regional Director's report on objections and challenged ballots, and order consolidating cases
March 22, 1967	Board adopts Regional Director's report and recommendations.

In his report, the Regional Director recommended that the challenges to the 9 ballots challenged by the Board agent, be sustained on the ground that at the time of the election said employees had been lawfully terminated and had no reasonable expectancy of recall. The remaining challenge, which turns on the supervisory status of Synakowski, and the merits of the Union's objections to conduct affecting the results of the election, the Regional Director recommended be consolidated with the unfair labor practice case, and be disposed of in that proceeding. No exceptions to the Regional Director's report and recommendations were filed, nor was there any request for leave to appeal to the Board.

At the hearing all parties were afforded full opportunity to submit evidence, examine and cross-examine witnesses, argue orally on the record, and submit briefs. Oral arguments were waived. Briefs submitted by the General Counsel and Respondent, respectively, have been duly considered.

Upon the entire record in the case, including my observation of the demeanor of the witnesses, I make the following:

Findings of Fact 3/

I. The Unfair Labor Practices

A. The Union's Majority Status and the Alleged Demand for Recognition

On October 28,4/ Robert Johnson who had voluntarily terminated his employment with Respondent the preceding day, contacted James Serris, business agent for Local 692, relative to organizing Respondent's employees. Later that day Serris gave Johnson a supply of authorization cards and instructed him relative to getting the cards signed. On Monday morning, October 31, Johnson went to Respondent's plant and got 14 employees to sign authorization cards. Respondent not only conceded the authenticity of these signatures, but it raises no question as regarding their validity as authorizations to the Union. It was also stipulated that as of the payroll period ending October 31, there were 19 names on the plant payroll, and that this situation prevailed on November 2.5/ On November 3, Business Agent Serris executed and filed with the Regional Office a petition for certification as representative of the employees involved. In answer to the question on said petition as to whether a request for recognition had been made, there appears the answer "None made to date."

3/ No issue of commerce or labor organization is presented. By answer to the complaint, stipulations in the course of the hearing, and in the stipulation for certification upon consent election, facts are admitted which establish these elements. I find the facts to be as so established. It is also admitted by the answer that the unit alleged in the complaint, constitutes a unit appropriate for the purpose of collective bargaining within the meaning of the Act, and I so find. The unit, is "All production and maintenance employees, including machine operators, truckdrivers, forklift operators, welders, painters, laborers, warehousemen, and yard helpers at Respondent's Long Beach, California, plant, excluding all office clerical employees, foremen, professional employees, guards, and supervisors as defined in the Act."

4/ This and all dates hereafter mentioned are 1966, unless otherwise indicated.

5/ The list included the names of James Strawder and LeVant Walker, truckdrivers referred to in a subsequent section hereof, and Martin Synakowski, whose supervisory status is hereafter considered, but does not include the name of Robert Johnson, who quit on October 28. This payroll period was stipulated as the eligibility payroll in the stipulation for certification upon consent election, which the parties executed December 5.

The evidence is clear that early in November, Business Agent Serris telephoned Plant Superintendent Chernove, but the evidence is in dispute as to when the call was made and what was said. On the entire record, and particularly on the basis of the aforementioned answer in the representation petition, I find that such call was made by Serris to Chernove on November 4, and that all Serris said was to inquire whether Respondent had received a copy of the representation petition and state that if Respondent did not fire any employees, there would be no problem. I further find that Serris did not, on this occasion, ask Chernove for recognition.6/ Both parties concede that except for this telephone conversation, there was no communication between the parties until they met at the Board office on December 5, when the stipulation for certification upon consent election was executed. Whether recognition was requested or otherwise discussed at that time, does not appear.

1. Employee complement on election day---ability of employees to vote

At the election held on December 20, only 5 unchallenged ballots were cast, although 19 names appeared on the eligible payroll. In the main, this was due to the fact that Respondent discharged two employees on November 2;7/ laid off three employees on November 21,8/ and four additional employees on November 28.9/ When these nine employees sought to cast their ballot, their right to vote was challenged by the Board agent. Finding that the discharges were for cause, that the layoffs were for legitimate business reasons, and that under Respondent's usual practice laid-off employees had no reasonable expectation of recall, the Regional Director sustained the challenges to the nine ballots.10/

The parties have stipulated that on December 16, Respondent, in the regular course of its business, sent its longhaul drivers James Strawder and LeVant Walker, on a trip to Provo, Utah, and that by reason thereof neither Strawder nor Walker was able to appear at the election held December 20.11/

6/ Based on the credited evidence of Chernove. Serris testified that he made such call about November 2, and certainly before he filed the representation petition; he told Chernove that the Union represented a majority of the employees; he demanded recognition; but that the latter refused, saying that he wished to see how the Board election came out. Serris explained the answer in the representation petition, above referred to, by saying that the document was prepared by a Board agent, and that he gave the latter no such information. I do not credit Serris.

7/ Stanford Montgomery and James Sanders.

8/ Clevelan Allen, Lloyd Smith, and Evers Hiner.

9/ Richard Majors, Charles Johnson, Tino Montoya, and Herbert McClain.

10/ The other challenged ballot was cast by Synakowski whose supervisory status is hereafter considered.

11/ The General Counsel contends that for this reason alone the election should be set aside. Respondent, on the other hand, contends that Synakowski is not a supervisor, that his ballot should, therefore, be opened and counted and if, as Respondent believes, (continued)

2. Supervisory status of Synakowski

Before detailing the evidence dealing with the acts of interference, restraint, and coercion alleged by the General Counsel, it is first necessary to determine whether Synakowski is a supervisor.

Respondent's plant is located at Long Beach, California, where it is engaged in processing pipe for the heavy construction and oil industries. Respondent's sales force and business office is located in Los Angeles, and from that office instructions for processing pipe to the customer's specifications and for shipment of processed materials, are transmitted to the Long Beach plant, generally by telephone. George Chernove, as plant superintendent, and Dudley Streetman, assistant plant superintendent, are the two in highest authority at the Long Beach plant, and are directly responsible for all of its operations. Both are admitted supervisors. Considerable evidence was taken, much of it in conflict, as to the time spent by Chernove and Streetman at the plant, but it may be fairly deduced therefrom that one or the other, if not both, was present at the plant the vast majority of its business hours.

In addition to Chernove and Streetman, the plant force consisted of the two longhaul truckdrivers who, except while loading and unloading, apparently spent most of their time away from the plant, and a number of men engaged in general yardwork, and in preparing pipe to the customer's specifications. The number of men so engaged fluctuated considerably dependent on the volume of business.12/ The men engaged in general yardwork performed such duties as general cleanup, painting or stenciling pipe, moving pipe from one area to another, and assisting in loading and unloading. The preparation of pipe to the customer's order required cutting the same to a designated length, if that was less than the standard length, and threading one or both ends of the pipe, to the depth and with the bevel specified by the customer. The preparation of the pipe is done on machines, two men working on each machine, and for the period prior to November 28, four machines appear to have been in operation daily. Apparently, once the machine is set up for a particular order the employees operating it need little direction in the performance of their duties; a spot checking of the pipe being all that is necessary to make certain that the adjustment of the machine has not changed. All employees, except Chernove and Streetman, are hourly paid and punch a timeclock.

The evidence is uncontradicted that Synakowski was among the most senior and highest paid of the hourly rated employees. It is also clear from the evidence that Synakowski was a competent and trusted employee, for he carried keys to the plant and opened it so the men could go to work, if neither Chernove nor Streetman was available at the starting hour of 8 a.m., which happened with some disputed degree of frequency. It is

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11/ his vote is against the Union, the tally of ballots would then stand 4 to 2 against the Union, and assuming that Strawder and Walker would both vote for the Union, there would be a tie with no bargaining representative selected. Hence, Respondent argues, the inability of Strawder and Walker to vote did not affect the results of the election.

12/ As indicated above, the number of such men on the payroll of October 31, was 19.

admitted that for a period of about 5 months, until June 1966, Respondent employed Harold Wertz in a supervisory capacity whose principle function was to schedule the work and supervise the operation of the pipe processing shop. Chernove testified that when Wertz left in June, the latter was not replaced, and that no consideration was given then, or at any other time, to making Synakowski a foreman.

It's Respondent's contention that except for the 5-month period when Wertz was employed in a supervisory position, all supervisory authority at the plant involved was vested in and executed by Chernove or Streetman, and that Synakowski was no more than an experienced and trusted employee who functioned as a leadman or tutor to the less experienced or junior employees. Considerable testimony was adduced by the parties, much of it in conflict, or at least inconsistent with other evidence adduced by the same party, as to the amount of time Chernove and/or Streetman spent at the plant, to show that other supervisory authority was necessary, or dealing with the question whether Synakowski, who admittedly gave work instructions to the employees, did so in the sense of responsibly directing their work performance, or simply as a messenger for Chernove or Streetman. I deem it unnecessary to set forth in detail all testimony of the nature just referred to, or to resolve the various conflicts therein, except to the extent that I hereafter do so, for in my view the great weight of the testimony, most of it uncontradicted, conclusively establishes that at all times material Synakowski was employed as a supervisor within the meaning of Section 2(13) of the Act. I rely upon the following:

1. Eight former employees gave testimony bearing on the supervisory status of Synakowski.13/ Seven of them testified in substance, although not all gave testimony as to each element, that (1) they regarded and looked upon Synakowski as their supervisor; (2) he usually gave them their work assignments; (3) on many occasions moved them from one job to another; and (4) gave such work assignments in language such "you go in and paint pipe today," or today "you help the boys thread pipe."14/ Although some of these witnesses agreed that from time to time they received work instructions from Chernove or Streetman, their testimony was that this happened infrequently and that for the most part work instructions were given to them by Synakowski.15/

13/ This included seven of the nine discharged or laid off during November. The two in this group that did not testify were Sanford Montgomery and Charles Johnson.

14/ The only witness on this subject that did not give testimony of this nature was Lloyd Smith, Jr. He testified that he worked as a welder's helper; that Synakowski tried to give him some orders, but he refused to obey because Chernove had told him that Synakowski was not over him. Because none of the other employees worked as welders or welder's helper, I do not regard Smith's testimony as necessarily inconsistent with the testimony of the remaining witnesses.

15/ The findings in this paragraph are based on the composite of the credited testimony of Bellville, Majors, Hiner, McLain, Montoya, Allen, and Sanders. Hiner and McLain particularly, impressed me as knowledgeable, honest, and straightforward. To the extent that the testimony of Chernove and Streetman is inconsistent with my findings herein, I do not credit it.

2. Shortly after Wertz left in June, McLain and Sanders asked Chernove and Bellville asked Streetman, who would replace Wertz as foreman. Each was told, in substance that Synakowski would replace Wertz, and they should take orders from Synakowski.16/

3. At least one of the three employees laid off on November 21 and three of the four employees laid off on November 28, were informed of that fact not by Streetman or Chernove, but by Synakowski.17/

4. At least four employees directed their requests for time off to Synakowski rather to Chernove or Streetman. Synakowski granted such requests on his own and without checking with any other source. The employees took the time off they had requested and when they returned to work no request for an explanation was made of them by Chernove or Streetman.18/ This fact takes on added significance in the light of Chernove's testimony that it was his duty to and he did check and approve all the timecards and that he knew when employees were absent. If, as Respondent contends, Synakowski was without authority to grant time off, and he knew employees were taking time off which he had not authorized, in the case of Sanders six or seven times in approximately a 6-month period, it is simply incredible that Chernove would not at least have asked some of these employees for an explanation.

5. Employee McLain asked Synakowski for a pay raise. Synakowski responded that he would discuss the matter with Chernove and let McLain know. Shortly thereafter Synakowski told McLain he had been granted an increase, and thereafter his pay was 10 cents an hour greater.19/

6. Respondent's failure to call Synakowski as a witness. The fair inference from the record is that the latter was employed by Respondent at the time of the hearing, and therefore under its control. Even if not under Respondent's control, there is no showing that he was not subject to subpena. Instead of calling Synakowski, who with respect to a substantial portion of the case, was the only person who could directly deny the testimony given by the employees, Respondent chose to rely on the testimony of Chernove and Streetman, who, in the main, testified in

16/ Streetman denied that he made such statement to Bellville. Although Chernove denied that he told any employee that Synakowski was a foreman, he admitted that some employees "could have" asked him that question. He also admitted that he told employees that they were required to obey Synakowski's orders. His explanation that this meant any order he might have transmitted through Synakowski or any other employees, I regard as weak and unconvincing. In any event, to the extent that the testimony of Streetman and Chernove is in conflict with that of McLain, Sanders, and Bellville on this point, I do not credit it.

17/ Based on the credited testimony of Clevelan Allen, Richard Majors, Herbert McLain, and Tino Montoya, Chernove claimed that he notified one group of employees but was unsure which group it was.

18/ Based on the credited and uncontradicted testimony of Bellville, Majors, Montoya, and Sanders. Synakowski did not testify.

19/ Based on the credited and uncontradicted testimony of McLain.

generalities. This at least gives rise to the inference that Synakowski if called, would not support Respondent's position. As the Supreme Court said in United States v. Interstate Circuit, 306 U.S. 208, 226, "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse."

Upon the totality of these considerations and the entire record in the case, I find and conclude that at all times material Synakowski was a supervisor within the meaning of Section 2(13) of the Act, that he was not entitled to vote at the election held on December 20, and that Respondent is responsible for any coercive statements he may have made to employees.

B. Interference, Restraint, and Coercion

1. By Synakowski

Shortly after employee McLain signed his union card on October 31,[20] Synakowski told him that he saw his car in front of the union hall, and asked McLain how the union meeting came out. McLain professed not to understand what Synakowski was talking about. Also, about mid-November, Synakowski asked McLain to talk to the boys and get rid of the Union, and he (McLain) would have a job for a long time; otherwise Synakowski added, if the Union got in, Chernove would close the plant down. Again, on November 28, when Synakowski told McLain that the latter was being laid off, and in reply to McLain's question as to the reason therefor, Synakowski replied, "Number one, . . . work is slow, and number two [it] is because of the Union."[21]

About 2 weeks prior to his discharge on November 28, employee Montoya while at his work station, was told by Synakowski to cease his efforts to get the Union in, and he would keep his job, but "if the Union came in that all of us would be out of a job." On the day of his discharge, Montoya was told by Synakowski that if he had "been cool and knocked the Union in the head [he, Montoya], would still be working there."[22]

About 2 weeks prior to his layoff on November 21, employee Hiner was told by Synakowski, "If the Union get[s] in here, everybody is going to be out work." Also, on November 21, Synakowski told employee Majors that the latter and employee McLain were going to be laid off and when Majors asked why, replied "you know it is because of the Union."[23]

20/ Chernove admitted that several days before he received the representation petition on November 4, he overheard a conversation in a local store, between individuals unknown to him, to the effect that Local 692 was attempting to organize Respondent's employees.

21/ Based on the credited and uncontradicted testimony of McLain. As heretofore stated, Synakowski did not testify.

22/ Based on the credited and uncontradicted testimony of Montoya.

23/ Based on the credited and uncontradicted testimony of Hiner and Majors.

About a week after he signed the union card on October 31, employee Allen was approached by Synakowski who stated, "Allen, so you are in the union now." When Allen denied this Synakowski added "Well you signed one of those cards." Allen then admitted that he had signed a union card. About a week later, while Allen was engaged in cleaning the plant office, Synakowski told Allen, "you do nice work. Just leave that union alone, and you will be all right."24/

2. By Chernove

About mid-November, Chernove had occasion to drive employee Majors from the plant to a hospital. During the trip, Chernove told Majors that he was going "to have to lay you boys off." When Majors asked why, Chernove stated that work was slow, but "mostly it is because of the Union." When Majors expressed regret at being laid off in view of the impending holiday season and his family obligations, Chernove replied "Well, the Union will take your money anyway. You pay one Hundred some dollars to join. You will be paying money to the Union every month." Chernove then added that with the Union in, it would be easier for Majors to get fired, that "the first morning you come in late you will be fired." On the way back from the hospital Chernove told Majors to talk to McLain and the other boys "and try to knock this union out, and I will see what I can do for you."25/

3. By Streetman

The early part of December, Assistant Plant Superintendent Streetman came to an area in the plant, where employees Bellville, Stewart, and Barraras were, and in an angry mood made a remark to the effect that the employees had "sure knifed him in the back." When Bellville asked what Streetman meant, the latter replied, "you know what I mean." Bellville asked if he meant the Union. Streetman replied that he did, and made some remark to the effect that "if anyone in the shop had a union card they wouldn't be working there."26/

C. Concluding findings

No citation of authority is necessary to support the proposition that statements of the character made by Synakowski, Chernove, and Streetman,

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24/ Based on the credited and uncontradicted testimony of Allen.

25/ Chernove did not deny that he had a conversation with Majors during the hospital trips. He did deny that he told any employee that if the Union got in it would take their money, or that it would be easier for them to get fired, or that he asked employees to knock out the Union. In fact Chernove's testimony was that he never discussed the Union with any employee. I do not credit his denials.

26/ Streetman denied that he ever made such a remark to any employee. The total effect of his testimony was that he never discussed the Union with any employee. I do not credit his denial. It is significant also, that Stewart and Barraras, who were present and heard the conversation referred to, were not called as witnesses by Respondent, nor was the failure to call them in anyway explained.

as found, are coercive, and hence violative of Section 8(a)(1) of the Act. I so find and conclude.27/

Upon the foregoing findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2) of the Act, and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the conduct set forth in section B, above, Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed to them by Section 7 of the Act, and thereby engaged in and is engaging in unfair labor practices proscribed by Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Having found that the Union made no demand on Respondent for recognition or bargaining, such demand being a prerequisite to a violation of Section 8(a)(5) of the Act (N.L.R.B. v. Columbian Enameling & Stamping Co., 306 U.S. 292, 297), the evidence fails to establish that Respondent violated Section 8(a)(5) of the Act, and that allegation of the complaint should be dismissed.28/

27/ The General Counsel contends that Synakowski, Chernove, and Streetman made statements to employees, in addition to those found above, which were violative of Section 8(a)(1) of the Act. The evidence so relied upon is, for the most part, conflicting. I find it unnecessary to pass upon such issues in view of the conclusions herein reached, for such incidents if found violative of the Act, would in no way enlarge the scope of the order to be entered herein, or change the results of this proceeding.

28/ Although not urged by the General Counsel, I have considered whether it might not be held that the representation petition filed by the Union on November 3, was a demand for recognition which imposed upon Respondent a duty to respond, but have concluded that such a holding would not be supported by Board precedent. Although I have found no case strictly in point, the Board's decision in Laabs, Inc., 128 NLRB 374, I regard as a holding by the Board that the mere filing of a representation petition is not, standing alone, a demand for recognition. In Laabs, Inc., a representation petition was filed on June 15, and on June 18 the petitioning union made formal demand on the employer for recognition. The Trial Examiner there found that the employer had unlawfully refused to bargain with the Union, and dated such refusal from June 15, the date the representation petition (continued)

The Remedy

Having found that Respondent interfered with, coerced, and restrained its employees in the exercise of rights guaranteed to them by Section 7 of the Act, and in view of the nature and character of Respondent's conduct in that regard, it will be recommended that Respondent be required to cease and desist from in any manner interfering with its employees in the exercise of rights guaranteed to them by Section 7 of the Act (N.L.R.B. v. Entwistle Mfg. Co., 120 F.2d 523 (C.A. 4); California Lingerie Inc., 129 NLRB 912, 915), and that it take the affirmative action set forth below, found necessary and designed to effectuate the policies of the Act.

Although I have concluded that the evidence fails to establish that Respondent unlawfully refused to bargain with the Union in violation of Section 8(a)(5) of the Act, I shall nonetheless recommend, because of the nature and extent of the violations of Section 8(a)(1) of the Act, as herein found, and as a part of the remedy for such violations, that Respondent be required, upon request, to recognize and bargain with the Union in order to prevent it from reaping the benefits of its own misconduct. There can be no question that the Union was the majority representative when it filed the representation petition, having on October 31, obtained valid authorization cards from 14 of the 18 employees in the unit (excluding Synakowski, whom I have found to be a supervisor). Even if there be excluded from consideration the nine employees (each of whom had signed a card), that the Regional Director found were lawfully terminated in November, the Union still represented five of the remaining nine, not only when the representation petition was filed, but even on the day of the election.29/ Under the facts of this case, the only logical conclusion is that the Union's failure to obtain a majority in the election was due to the fact that extensive and flagrant 8(a)(1) conduct herein found, and which clearly had for its purpose the undermining of the Union and the destruction of its majority status, had the intended effect. The law so assumes. Western Aluminum of Oregon Incorporated, et al, 144 NLRB 1191, 1192, and the cases there cited. In such a situation, only a bargaining order will restore the status quo ante, and prevent Respondent from reaping the benefits of its unlawful conduct. D. H. Holmes Company, Ltd, v. N.L.R.B., 179 F.2d 876, 879 (C.A. 5); Piasecki Aircraft Corporation v. N.L.R.B., 280 F.2d 575, 591 (C.A. 3), cert. denied 364 U.S. 933;

28/ was filed. The Board modified the Trial Examiner's holding, and fixed the date of such refusal to bargain as June 18, stating "Respondent correctly contends that the filing of a petition does not constitute a request for bargaining so as to make its failure to bargain without more, a violation of Section 8(a)(5) of the Act" [Emphasis supplied]. In the instant case no such demand was ever received by Respondent.

29/ The employees on the payroll as of the date of the election (after excluding the nine terminated in November), were Julian Barraras, Owen Bellville, E. W. Fritz, John Rabe, Henry Shanchez, Walter Stewart, Benjamin Tiajillo, James Strawder, and LeVant Walker. Of these Barraras, Bellville, Fritz, Stewart, and Tiajillo signed authorization cards on October 31.

N.L.R.B. v. Delight Bakery, Inc., 353 F.2d 344 (C.A. 9); Editorial "El Imparcial" Inc. v. N.L.R.B., 278 F.2d 184 (C.A. 1); N.L.R.B. v. Falstaff Distributing Company, 209 F.2d 265, 268 (C.A. 8); Luisi Truck Lines, 160 NLRB No. 45; Crystal Tire Co., 165 NLRB No. 82. Cf. N.L.R.B. v. Flomatic Corp., 347 F.2d 265; Benson Wholesale Company, Inc., 164 NLRB No. 75.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is recommended that the National Labor Relations Board order that L. B. Foster Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating its employees regarding their or other employees' activities or sympathies for or against any labor organization.

(b) Promising benefits to any employee for ceasing to support or assist any labor organization.

(c) Requesting any employee to urge other employees not to assist or support any labor organization.

(d) Telling any employee that his termination is because of assistance or support of a labor organization.

(e) Telling any employee that a union in its plant would result in a reduction of work for all employees.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized by Section 8(a)(3) of said Act.

2. Take the following affirmative action found necessary and designed to effectuate the policies of the aforesaid Act:

(a) Upon request, bargain collectively with General Truck Drivers, Chauffeurs & Helpers Local 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in a unit composed of "All production and maintenance employees, including machine operators, truckdrivers, forklift operators, welders, painters, laborers, warehousemen, and yard helpers at its Long Beach, California, plant, excluding office clerical employees, foremen, professional employees, guards, and supervisors as defined in the Act," with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a written signed agreement.

(b) Post at its plant in Long Beach, California, copies of the attached notice marked "Appendix."30/ Copies of said notice, on forms provided by the Regional Director for Region 21 (Los Angeles, California), after being signed by a duly authorized representative, shall be posted by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the aforesaid Regional Director, in writing, within 20 days from the date of receipt of this Decision, what steps it has taken to comply herewith.31/

IT IS FURTHER RECOMMENDED that the complaint herein to the extent that it alleges a violation of Section 8(a)(5) of the Act, be dismissed.

II. Report on Challenges and on Objections to Conduct Affecting the Results of the Election

Having found, as herein set forth, that Respondent engaged in extensive and substantial violations of Section 8(a)(1) of the Act, during the period between the filing of the representation petition and the election, it follows that the election held on December 20, in Case 21--RC--10261, must be set aside, and I so recommend. Dal-Tex Optical Company, Inc., 135 NLRB 1782; Leas & McVitty, Incorporated, 155 NLRB 389, and the cases there cited. In view of this conclusion, it is unnecessary to decide whether the fact that Strawder and Walker were prevented from voting because they were sent out of town by Respondent, requires the setting aside of the election. Having recommended a bargaining order against Respondent, no purpose would be served by conducting a new election. Accordingly, IT IS FURTHER RECOMMENDED, that the Board dismiss the petition in Case 21--RC--10261, and vacate all proceedings had in connection therewith.

Dated at Washington, D.C.

30/ In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

31/ In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps it has taken to comply herewith."

TXD--447--67

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT coercively interrogate our employees regarding their or other employees' activities or sympathies for or against any union.

WE WILL NOT promise benefits to any employee to induce him to withdraw his support or assistance to any union.

WE WILL NOT ask any employee to urge other employees to cease supporting any union.

WE WILL NOT tell any employee that his termination is because our employees are assisting or supporting a union.

WE WILL NOT tell any employee that a union in our plant will result in a reduction of work for all employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form, join, or assist General Truck Drivers, Chauffeurs & Helpers, Local 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8(a)(3) of the Act.

TXD--447--67

WE WILL, on request, recognize and bargain with General Truck Drivers & Helpers, Local 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive representative of our employees in a unit composed of all production and maintenance employees, including machine operators, truckdrivers, forklift operators, welders, painters, laborers, warehousemen, and yard helpers at our Long Beach, California, plant, excluding all office clerical employees, foremen, professional employees, guards, and supervisors as defined in the aforesaid Act, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a written signed agreement.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of the above-named or any other Union.

L. B. FOSTER COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 849 South Broadway, Los Angeles, California, 90014, Telephone 688--5229.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1160

L. B. FOSTER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 418 F. 2d 1. The Board's decision and order (Pet. App. 15a-32a) are reported at 168 NLRB No. 15.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9a-13a) was entered on October 31, 1969, and a petition for rehearing was denied on December 2, 1969 (Pet. App. 14a). The petition for a writ of certio-

rari was filed on February 7, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether the National Labor Relations Board properly ordered the company to recognize and bargain with the union as a remedy for its violations of Section 8(a)(1) of the National Labor Relations Act.

2. Whether the court below properly held that the company was responsible for the coercive statements of Foreman Synakowski.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 2-4 of the petition. Also relevant are Sections 7 and 8(a)(1) of the Act which provide:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

STATEMENT

The L. B. Foster Company processes industrial pipe at its Long Beach, California plant. George Chernove, plant superintendent, and Dudley Streetman, assistant plant superintendent, were directly responsible for plant operations (Pet. App. 22a). Under Chernove and Streetman was Foreman Martin Synakowski, who gave the shop and yard employees their daily work assignments and working instructions. In addition, Synakowski inspected the work of the shop employees, reprimanded them when he found their work unsatisfactory, and granted the employees' requests for time off without checking with his superiors. Although Synakowski did not have independent authority to grant employee requests for wage increases, he presented such requests to Chernove, together with his evaluation of the employees' capabilities; Chernove took this evaluation into account in determining whether to grant the requests. (Pet. App. 23a-24a; Tr. 58-66, 109-114, 140-143, 154-155, 157-159, 182, 184-187, 196-200, 213-217.)[1] The employees regarded Synakowski as their foreman; indeed, Chernove informed several employees when the previous foreman left,[2] that Synakowski would re-

[1] "Tr." references are to the stenographic transcript of the hearing before the Trial Examiner.

[2] The Company conceded the supervisory status of the previous foreman (Pet. App. 22a-23a; Tr. 304-306).

place him and they should take orders from Synakowski (Pet. App. 24a; Tr. 55-57, 109, 139, 156-157, 184, 196, 213-215).

On October 31, 1966, General Truck Drivers, Chauffeurs & Helpers, Local 692, International Brotherhood of Teamsters, began a drive to organize the Company's employees. It secured signed authorization cards [3] from 14 of the 18 employees in the bargaining unit that same day and, shortly thereafter, filed a representation petition with the Board. (Pet. App. 20a.) A Board election was scheduled for December 20 (Pet. App. 21a). Management immediately embarked upon an anti-union campaign.

Employee McLain, who signed a union authorization card on October 31, was questioned by Foreman Synakowski the next day about the outcome of a union meeting, because Synakowski "saw [McLain's] car parked in front of the union hall." Two weeks later, Synakowski admonished McLain that "Mr. Chernove was going to close the shop down if we get a union in here." Synakowski added that McLain "would have a job for a long time" if he would "talk to the boys and get them to get rid of this Union." Finally, on November 28, Synakowski told McLain that he was being laid off because "number one, your work is slow, and number two because of the Union." (Pet. App. 25a; Tr. 161-163.)

Employee Allen, like McLain, signed a union authorization card on October 31. A week later, Syna-

[3] The Company did not challenge the validity of the authorization cards (Pet. App. 20a; Tr. 48).

kowski informed Allen that management knew that he had "signed one of those cards." Synakowski later cautioned the workers: "you do nice work. Just leave the Union alone and you will be all right." (Pet. App. 26a; Tr. 201-203.) Synakowski also interrogated employee Montoya "about the Union" and, at the same time, warned him, "if the Union came in * * * all of us would be out of a job," but, if Montoya would abandon his organizational efforts, he might keep his job. When Montoya too was laid off on November 28, Synakowski commented that, if Montoya "had been cool and knocked the Union in the head, [he] would still be working there" (Pet. App. 25a; Tr. 187-188).

In mid-November, Plant Superintendent Chernove warned employee Majors that he "was going to have to lay you boys off, * * * mostly it is because of the Union." He added that, with the Union in, it would "be easier to get fired. The first morning you come in late, you will be fired." Chernove, at the same time, asked Majors to "talk to Herb [McLain] and the other boys and try to knock this Union out, and I will see what I can do for you." (Pet. App. 26a; Tr. 116, 117.) Majors was discharged on November 28. Synakowski explained, "You know it is because of the Union." (Pet. App. 25a; Tr. 115-116.)

In early December, Assistant Superintendent Streetman accused employees of having "knifed him in the back" because of their support of the Union. Street-

man made clear to 3 of the 9 unit employees[4] that "if anyone in the shop had a union card they wouldn't be working there" (Pet. App. 26a; Tr. 66-67, 95-96).

The Union lost the ensuing Board election by a vote of 2 to 3, with 10 challenged ballots[5] (Pet. App. 19a, n. 2). The Union filed objections to the election, which were consolidated for hearing with the present unfair labor practice case, which the Union had also initiated (Pet. App. 19a).

The Board found that the statements of Chernove, Streetman and Synakowski[6] were coercive, and that the Company thus violated Section 8(a)(1) of the Act (Pet. App. 26a-27a).[7] The Board also found that

---

[4] Nine of the 18 unit employees were laid off prior to the December 20 election (Pet. App. 21a). However, the Union still had authorization cards from 5 of the remaining 9 employees (Pet. App. 28a).

[5] The Board's Regional Director sustained the challenges to 9 of the ballots on the ground that the employees involved, although listed on the payroll on October 31, had been lawfully discharged prior to the election without reasonable expectancy of recall. The remaining challenge, to the ballot of Martin Synakowski, turned on the issue of Synkowaski's supervisory status, which was left to be determined in the present unfair labor practice case. (Pet. App. 19a, n. 2.) Two employees were not able to vote, as the Company sent them on an overnight trip the day before the election (Pet. App. 21a, n. 11).

[6] The Board found that Synakowski was a supervisor within the meaning of Section 2(11) of the Act and that the Company was responsible for his coercive statements (Pet. App. 25a). The supervisory status of Chernove and Streetman was conceded (Pet. App. 22a).

[7] The Board dismissed an allegation that the Company also violated Section 8(a)(5) of the Act, finding that the Union had made no demand on the Company for recognition (Pet. App. 27a).

the Union had obtained valid cards from a majority of the employees authorizing it to represent them when it filed its petition for an election, and that "the only logical conclusion is that the Union's failure to obtain a majority in the election was due to the fact that [*sic*] extensive and flagrant 8(a)(1) conduct herein found, and which clearly had for its purpose the undermining of the Union and the destruction of its majority status, had the intended effect" (Pet. App. 28a). The Board concluded that, "In such a situation, only a bargaining order will restore the *status quo ante*, and prevent [the Company] from reaping the benefits of its unlawful conduct" (*ibid.*).

The court of appeals sustained the Board's findings and conclusions,[8] and enforced its order in full. The court found that a bargaining order was appropriate under the principles articulated in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575. (Pet. App. 1a-7a.)

ARGUMENT

1. The court of appeals correctly applied the principles enunciated in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575. Petitioner contends (Pet. 6-9) that *Gissel* is distinguishable because the bargaining orders there remedied violations of Section 8(a)(5), whereas here there was a

[8] The court did not find it necessary to rule on Synakowski's supervisory status, holding that, since Synakowski clearly was acting for the Company, his acts were attributable to it regardless of his supervisory status (Pet. App. 2a, n. 1).

violation only of Section 8(a)(1). The Court's rationale in *Gissel*, however, is not confined to refusals to bargain in violation of Section 8(a)(5). The Court noted with approval that the Board has long had a "policy of issuing a bargaining order, in the absence of a § 8(a)(5) violation or *even a bargaining demand*, when that was the only available, effective remedy for substantial unfair labor practices" (395 U.S. at 614, emphasis added).

Moreover, although three of the cases covered by the *Gissel* opinion were remanded for further findings, in one (*Sinclair*, No. 585) the Court sustained a bargaining order because the Board had made a finding, accepted by the court of appeals, that "the employer's threats of reprisal were so coercive that, even in the absence of a § 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those threats." *Id.* at 615. This was the situation here, for the Board found, with the concurrence of the court below, that the Company's coercive conduct was "extensive and flagrant" (Pet. App. 4a-5a).[9]

2. Petitioner's contention (Pet. 11-14) that it cannot be held responsible for Synakowski's state-

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[9] *National Labor Relations Board* v. *Patent Trader, Inc.*, 415 F. 2d 190 (C.A. 2), Board petition for rehearing in banc pending, does not require a contrary conclusion. The court there found that the violations of Section 8(a)(1) were not "flagrant" and that there were other special circumstances which militated against a bargaining order. Moreover, for the reasons set forth by Judge Feinberg in his dissent, the court's action in *Patent* is contrary to this Court's decision in *Gissel*.

ments because the court below did not rule on the Board's finding that he was a supervisor likewise presents no issue warranting further review. This Court has long held that an employer may be held accountable for the conduct of non-supervisory employees acting as his agent. See *Int'l Assn. of Machinists* v. *National Labor Relations Board*, 311 U.S. 72, 80. Since the Company had represented to the employees that Synakowski was their supervisor and the employees so regarded him (*supra*, pp. 3-4), there was ample basis for finding an agency relationship here.[10] *Betts Baking Co.* v. *National Labor Relations Board*, 380 F. 2d 199, 202 (C.A. 10).

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[10] Section 2(2) of the Act provides that the term "employer" includes "any person acting as an agent of an employer directly or indirectly." Section 2(13) provides that in determining whether any person is acting as an "agent" of another person "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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